Education Audit Appeals Panel
State of California

Fiscal Year 2003-2004 Audit Appeal by: UNION SCHOOL DISTRICT Appellant.	EAAP Case No. 05-11 OAH No. N2005040140

Decision

The Education Audit Appeals Panel has adopted the attached Proposed Decision of the Administrative Law Judge as its Decision in the above-entitled matter.

Effective date: 12 September 2005

IT IS SO ORDERED.

12 September 2005
Date

Thomas E. Dithridge, Chairperson
for Education Audit Appeals Panel

BEFORE THE
EDUCATION AUDIT APPEALS PANEL
STATE OF CALIFORNIA

In the Matter of the Appeal (Statement of Issues) of:	Case No. 05-11
UNION SCHOOL DISTRICT,	OAH No. N2005040140
Appellant.	

PROPOSED DECISION

On agreement among the parties, the matter was presented only on certain stipulated factual findings along with a declaration by one individual that were supplemented by written arguments. The matter was presented to Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings (OAH), State of California.

Nancy L. Beauregard,[1] Esq., Miller Brown and Dannis, Attorneys at Law, 71 Stevenson Street, 19th Floor, San Francisco, California 94105, represented the Union School District (Appellant).

Gary D. Hori, Staff Counsel, represented Steve Westly, California State Controller.

Roy S. Liebman, Deputy Attorney General, represented the Department of Finance, State of California.

The parties were deemed to have submitted the matter as of July 18, 2005.

Procedural Background

1. On April 1, 2005, by letter, through its chief financial officer, Appellant timely filed with the Education Audit Appeals Panel (EAAP), State of California, an appeal of audit finding number 2004-2 for the fiscal year 2003-04.

On April 6, 2005, OAH received Appellant's letter, which was deemed as a notice of appeal, as well as correspondence, dated April 5, 2004, from staff counsel with the EAAP that requested that a date be set by OAH of a hearing on the appeal.

[1] Because Ms Beauregard no longer is associated with Miller Brown and Dannis, as of about July 18, 2005, Appellant's attorney of record is Glenn Gould, Esq., of Miller Brown and Dannis.

On April 18, 2005, staff counsel for EAAP dispatched a Notice of Hearing that set a hearing date of Monday, June 13, 2005. But, on the motion of counsel for the State Controller's Office, OAH issued an order that granted a continuance of the original hearing date so as to set the matter for hearing on June 30, 2005.

On April 19, 2005, the California Department of Finance filed with OAH a Notice and Motion to Intervene in the matter of the appeal by Appellant. On May 4, 2005, the presiding administrative law judge for the regional office of OAH in Oakland issued an Order Granting [the] Motion to Intervene so that the Department of Finance became a party to the appeal proceedings.

On May 31, 2005, Appellant's counsel notified OAH of an interest to have the parties file a stipulated statement of facts and to forego a formal administrative adjudication proceeding. On June 3, 2005, OAH received correspondence from Appellant's counsel's office that set out an understanding between the parties "that the case will be deemed submitted on the briefs, and no oral argument hearing will be conducted." That letter prescribed a schedule for filing of a written stipulated statement of facts and written argument through July 18, 2005.

On June 23, 2005, OAH received from Appellant's counsel a document titled "Statement of Stipulated Facts." The document had attached to it exhibit A that consisted of the title page of Appellant's Annual Financial Report, dated June 30, 2004, and a single page captioned "Schedule of Audit Findings and Questioned Costs, June 30, 2004, Section IV," which bore page number 63. The stipulated statement of facts was marked as exhibit "1-a." On June 28, 2005, via telefacsimile transmission, OAH received from Appellant's counsel a document titled "Amended Statement of Stipulated Facts." The telefax version of the stipulated statement of facts was marked as exhibit "1-b-i." Exhibit 1-b-i was received as the controlling document and deemed the parties agreement on evidence.

Also on June 23, 2005, OAH received "Appellant's Opening Brief," which was marked as exhibit "2," and received as argument. Appellant's brief had attached a form titled "Union School District - Notice of Retention/Promotion" and the "Declaration of Nan Wojcik in Support of Appellant's Opening Brief." These documents were respectively marked as exhibit "3" and exhibit "4" and received in evidence.

On July 11, 2005, OAH received the "Opposition Brief by the State Controller's Office," which was marked as exhibit "A," and received as argument.

On July 13, 2005, OAH received a brief titled "Department of Finance's Opposition to the Appeal of Respondent," which was marked as exhibit "B," and received as argument.

According to Appellant's counsel's letter, dated June 3, 2005, the agreed upon briefing schedule contemplated that by "July 18, 2005, Appellant may file/serve a Reply

(brief) to Opposition." Appellant did not file a Reply Brief by the appointed date. Due to lack of receipt of communication from Appellant's counsel within OAH between July 13, 2005, and July 18, 2005, the assigned administrative law judge dispatched correspondence to respective counsel for the parties. The letter listed the documents received by OAH from the parties and sought receipt of the original Amended Statement of Stipulated Facts. On July 26, 2005, OAH received the original Amended Statement of Stipulated Facts, which was marked as "1-b-ii," and received in evidence.

On July 18, 2005, the parties were deemed to have submitted the matter, and the record closed.

2. The matter did not proceed to hearing within ninety days of Appellant's filing of a notice of appeal.[2] On April 1, 2005, Appellant filed a notice of appeal so that the limitations period began to run on that date. Within the ninety-day limitations period that expired on June 30, 2005, Appellant waived the sort of administrative adjudication hearing as contemplated under Chapter Five (§ 11500 et seq.) of the Government Code and as specified in Education Code section 41344, subdivision (d), when before and on June 3, 2005, Appellant communicated with OAH to void a scheduled hearing date at the Oakland regional facility of OAH.

By waiving a formal administrative adjudication hearing at OAH, Appellant requested to submit the matter for decision on the parties' formulation of an amended statement of stipulated facts, the parties' respective arguments as set out in written briefs, and a declaration of Ms Nan Wojcik, Appellant's Chief Financial Officer.

Stipulated Factual Findings

The parties, through counsel, filed an Amended Statement of Stipulated Facts as:

> "1. On September 9, 2004, Goodell, Porter & Fredericks, LLP, Certified Public Accountants, completed an independent auditor's report regarding the financial statements ('Audit Report') of the Union School District ('District') for the 2003-04 fiscal year. On January 25, 2005, the State Controller's Office, Division of Audits, completed its review and certified that the Audit Report conformed to the reporting standards contained in the State Controller's Audit Guide.
>
> "2. Audit finding 2004-2 set forth in sum that District retained nine (9) students for a second year of kindergarten. The retention form used by the District was a form that was not approved by the California Department of

[2] The records in evidence do not include a pleading captioned "Statement of Issues." (Gov. Code, sec. 11504.)

Education ('CDE'). [Omission of reference to an attachment to the Stipulated Statement, namely a copy of Audit Finding 2004-2 as Exhibit "A," which was incorporated by this reference into the Amended Stipulated Statement of Facts.] Accordingly, the Audit Report indicated that the District's inclusion of the student's attendance in its ADA computation was impermissible.

"3. The audit report determined that the District could not claim any of the nine (9) repeat kindergarten students. With a $4,572 revenue limit per ADA this would result in a loss of $36,576 for the District.

"4. On April 1, 2005, the District filed a formal appeal of the audit finding.

"5. The District's 'Notice of Retention/Promotion' form that it used for the relevant audit period contained space for the name of the student, and space for the parent to either agree with the District's retention decision or request an appeal of the decision. The form did not specifically inform parents that they have the right to have their child promoted to first grade unless a parent elects to continue a child in kindergarten.

"6. CDE has promulgated an approved Parental Agreement Form-Agreement for Pupil to Continue in Kindergarten ('Parental Agreement Form') that satisfies the requirements of Education Code section 46300. The Parental Agreement Form includes space for the pupil's name and kindergarten attendance anniversary date, and the name of the school official approving continuance in kindergarten for the school district. The Parental Form further states as follows:

> 'Information for parent or guardian
>
> California law provides that after a child has been lawfully admitted to a kindergarten and has attended for a year, the child shall be promoted to the first grade unless the school district and the child's parent/ guardian agree to having the child continue to attend kindergarten for not longer than one additional year. This rule applies whether a child begins kindergarten at the beginning of a school year or at some later date, so that a child who begins kindergarten in January, for example, shall be promoted the following January unless there is formal agreement to have him or her continue in kindergarten. Because kindergarten-age children often do not develop at steady or predictable rates, the California Department of Education recommends that approval for a child to continue not be given until near the anniversary of a child's admittance to kindergarten.

I agree to having my child (named above) continue in kindergarten until _____(date may not be more than one year beyond anniversary date)'

"There are lines at the bottom of the form for parent signature and date, parent address and telephone number."

ISSUE

Was the kindergarten-retention form as used by Appellant, in its capacity as a school district, sufficient under the Education Code to comply with the requirement that a school district give explicitly worded notice to a parent of an affected kindergarten child that such child must be promoted to first grade, unless the parent knowingly gave consent that the child will be retained in kindergarten for an additional year.

CONTENTIONS OF PARTIES

I. Appellant contends that regarding nine children, who were retained in kindergarten, Appellant, in its capacity as a school district, its personnel met with each child's parent in the instance of the district's decision to retain, or hold-back, a pupil in kindergarten. And Appellant contends that it received such parent's approval to retain the child in kindergarten for an additional year.

Further Appellant contends that when it learned of its use of a noncompliant or incorrect form, Appellant notified the parents or guardian of a retained kindergarten pupil and then Appellant presented the parent or guardian with the form approved by the California Department of Education (CDE).

And Appellant contends that "while it is true the retention form used by [Appellant] was not an 'approved form,' the form provided essentially all of the information contained in the [California Department of Education]-approved form. As such, the use of the form was a minor or inadvertent noncompliance...."

And since the Appellant has used the CDE-approved kindergarten retention form, the doctrine of substantial compliance should work to relieve Appellant of reimbursement of state appropriation of funding for average daily attendance, and so its appeal should be granted.

II. The State Controller's Office and the Department of Finance contend that Appellant, as a school district, failed to use the form approved by CDE to give notice to the parent of a child who was proposed for retention in kindergarten for another year. Further the form used by Appellant was not sufficient in form or content to enable informed consent

by a parent of an affected kindergarten pupil because the notice-of-retention form did not specifically inform the parent that such parent had the right to prompt Appellant, as a school district, to promote the kindergarten pupil to first grade unless the parent elected to continue the pupil in kindergarten. And because the form used by Appellant, as a school district, was so defective as to meet neither the spirit nor letter of the law for the legally sufficient notice-of-retention form language, Appellant cannot be deemed to have substantially complied with the applicable Education Code section. Hence the appeal must be denied and the District must reimburse the State the sum of $36,576 for an excessive claim for average daily attendance funding.

FACTUAL FINDINGS

1. Page 63 of the Audit Report of Appellant for the 2003-04 fiscal year set out the following:

> Section IV- State Award Findings and Questioned Costs (Concluded)
>
> 2004 – 2 – KINDERGARTEN CONTINUATION – 40000
>
> Specific Requirement That Was Not Complied With: State Advisory 90-1- requires a state approved retention form to be completed prior to the beginning of the second year for each kindergarten student continued for a second year.
>
> Finding: We reviewed the District records for each of the nine kindergarten students continuing for a second year in kindergarten and determined that the retention form the District was using was not the State approved form.
>
> Amount of Questioned Cost and How Computed: The ADA generated by the nine students was 8.41.

ADA x	Base Revenue Limit	=	Apportionment
8 x	$4,572	=	$36,576

> Recommendation: We recommend the District begin using the state approved kindergarten continuation form for all kindergarten students continued for a second year. In addition, the District should file amended P-2 and

annual attendance reports for 2003-2004 to omit the students.

District Response: When the difference in the forms was brought to the District's attention, the District attempted to correct any problem by having the kindergarten parents sign the State approved form. The State has determined that because the District did not have the parents originally sign the State approved form that the District will lose the 8.41 ADA generated from the nine repeat kindergarten students. We have amended the 2003-04 P-2 and annual attendance reports to omit the students and will seek an audit appeal on this item.

Appellant's Defective Form of Notice

2. Appellant used a form of notice that set out:

> In accordance with Education Code Section 48070.5 (d) and Union School Board Policy 5123, your child is:...
>
> "being recommend for retention because he/she had failed to meet the District's minimum standards required for promotion. Notification of At Risk of Retention was discussed with you on _____ at the following meeting(s) ....
> ...
>
> I agree with this decision
>
> I do not agree with this decision and wish to appeal the process*
> ...
>
> * If you wish to appeal this decision to retain/promote your child, you must submit an appeal to the school Principal within 10 days of receipt of this notice, on or before
>
> _____

Fallacious Basis of Appellant's Contentions

3. Ms Nan Wojcik, Appellant's Chief Financial Officer, presented a declaration in this matter on behalf of Appellant. The assertions of Ms Wojcik are not persuasive on the issue of Appellant's breach of standards required by law for use of forms in giving parents notice of proposed retention of a child in kindergarten, where such pupil is counted in average daily attendance census and upon which apportionment funding could be payable to Appellant.

a. Ms Wojcik's declaration cannot be read to credibly show that Appellant was in substantial compliance with the statutory requirements for use of the form necessary to elicit informed consent from parents of affected kindergarten pupils.

And the declaration showed no authority for Appellant's entitlement to apportionment funding for the ADA census due to retention of kindergarten students in light of statutory deficiency in Appellant's form of notice, even when the missing elements purportedly were inadvertent and had no negative consequences for students.

b. Ms Wojcik's declaration cannot support Appellant's argument that the missing elements in the form reflect minor deficiencies. Ms Wojcik did not show how the inferred ignorance of law by Appellant regarding the missing essential elements in the subject school district's form of notice can be deemed as having been "inadvertently omitted" within the meaning of section 41344.1, subdivision (c) of the Education Code.

c Appellant's Opening Brief advanced unsound reasoning for Appellant's defense of "substantial compliance" with the law. Ms Wojcik, as Appellant's representative, posited in her declaration that "the District met with each child's parent and received ... approval to retain [the] child for another year in kindergarten." But, the legislature intended Appellant to employ explicit language in the form of notice that reflects the rule that a child in kindergarten shall be promoted to the first grade unless the child's parent or guardian agrees to the child be retained in kindergarten. The law does not permit as legally sufficient Appellant's effort that envisioned an ill-defined scheme for retention of students in kindergarten.

d. Ms Wojcik's declaration failed to competently show how the District instituted its meetings between parents and Appellant's personnel so as to achieve the statutory objective of reasonably assured transmission of informed consent to a parent of an affected kindergarten pupil at the first instance upon which Appellant learned of its use of the legally defective form of notice. Moreover, Ms Wojcik's declaration failed to show how the after-the-fact meetings met other goals of establishing as a default procedure a school district's orientation for promotion to first grade for a pupil who has spent one year in kindergarten, and vesting a parent with a sense of control in aiding the establishment of the future educational environment for an affected kindergarten pupil.

4. The deficiency in Appellant's form of notice showed an unreasonable neglect of statutory requirements. Such neglect, which involved a material departure from statutorily required elements, cannot be viewed as a basis to determine that Appellant acted in good faith when it crafted the defective form that lacked subject essential language.

5. Because Appellant's notice did not explicitly state the mandatory language prescribed by the California Department of Education, there was no means to ensure that the statutory mandates would be continuously and faithfully complied with by agents of the subject school district in Appellant's action to retain nine children in kindergarten for the subject audit year, and the State of California did not pay appropriations on an improperly inflated average daily attendance census of kindergarten pupils.

Ultimate Findings

6. The inexact form of notice used by Appellant in giving information to parent regarding a determination not to promote a student from kindergarten to first grade, lacked essential elements that were, as a matter of law, required to be included in Appellant's form of notice to parents of the affected students.

7. Appellant's form of notice, as used for the fiscal year that ended on June 30, 2003, did not contain legally sufficient notice to parents so that informed consent could reasonably be formed in making a decision to retain, or hold-back, a kindergarten pupil from advancing to first grade.

8. Appellant did not comply or substantially comply with all legal requirements in the implementation of Education Code section 46300, which pertains to the form of Parental Agreement Form –Agreement for Pupil to Continue in Kindergarten, for the fiscal year 2003-2004.

9. No basis in fact warrants Appellant to receive the entirety of the apportionment fund that may have resulted from an unlawfully crafted Parental Agreement Form – Agreement for Pupil to Continue in Kindergarten for the fiscal year 2003-2004.

LEGAL CONCLUSIONS

1. Education Code section 48011 sets forth, in pertinent part:

> A child who… has been admitted to the kindergarten maintained by a private or a public school in California or any other state, and who has completed one school year therein, *shall be admitted* to the first grade of an elementary school unless the parent or guardian of the child and the school district

agree that the child may continue in kindergarten for not more than an additional school year. (Emphasis added.)

Education Code section 46300, subdivision (g), establishes, in part:

> In computing *the average daily attendance* of a school district, there shall be included the attendance of pupils in kindergarten after they have completed one school year in kindergarten *only if* the school district has on file for each of those pupils an agreement made pursuant to Section 48011, *approved in form and content by the State Department of Education* and signed by the pupil's parent or guardian, that the pupil may continue in kindergarten for not more than an additional school year. (Emphasis added.)

The Education Code requires that after a pupil has completed one year in kindergarten, the pupil must be promoted to the first grade, unless the pupil's parent or guardian elects to have the child retained or held back in kindergarten. In order to assure the informed consent of a parent, who may decide to retain a child in kindergarten, a school district must give notice to such parent through a form that contains the precise language approved by the California State Department of Education.

The rationale for the statutory rules is to prevent a school district from receiving public money by way of overstatement of attendance figures for pupils improperly retained in kindergarten.

2. In this matter, during the annual audit pertaining to Appellant's fiscal year 2003-04, the independent auditor detected Applicant had used an improper parental-notice-of pupil-retention form for nine kindergarten pupils. A proposed penalty ensued that required Appellant to reimburse the State for public money received for "over-claiming student attendance."

Appellant's argument strives to diminish the findings of the adverse audit report by unpersuasively asserting that its form of notice provided essential information as gleaned from the state-approved form of notice. But Appellant has grievously erred.

Appellant's subject notice form is vastly distinct from the state-approved form. Appellant's notice form cannot be determined to have substantially complied with the Education Code's prescription for a school district's lawful claim of money derived from average daily attendance regarding the subject allowance for nine kindergarten pupils.

The text in Appellant's form of notice begins by purportedly informing a parent that a child's retention or promotion was: "*In accordance with Education Code section 48070.5* and Union School Board Policy 5123...." (Emphasis added.) But, Education Code section 48070.5 is inapplicable to kindergarten. Section 48070.5 authorizes a board of trustees to establish a policy for promotion and retention of pupils beginning with the second grade. Erroneous citation to an inapplicable statutory provision in the notice reflects an instance of such false and misleading information as to deprive a parent of the ability to foster informed consent.

Further, Appellant's form of notice omitted information for disclosure to a parent that according to California law that when a pupil has attended kindergarten for one year, such child must be promoted to first grade, unless a parent knowingly elects to have the child retained in kindergarten for another year. By omitting that significant statutory directive, a parent may not acquire knowledge that under California education law the parent controls superior decision-making authority as measured against a school district on the issue of a child's retention in kindergarten or promotion to first grade. Such omission of elemental aspects of California education law as shown in the form of notice used by Appellant makes Appellant's form nugatory and non-operative and invalid.

But a flaw of obvious fatal quality in the form used by Appellant was the procedural mechanism that mandated a parent, who might be in disagreement with the school district's determination for retention of a pupil in kindergarten, to (i) request an appeal (ii) to a school principal (iii) within a specified time span of 10 days from the day the disputing parent first received the defective notice form. California education law prescribes no requirement that a parent seek a hearing on appeal. Such "red tape" is an unnecessary burden for a parent faced with such a critical decision, which the law substantially vests in the parent. Moreover, the law does not contemplate intimidation to be visited upon a parent by way of the prospect of endeavoring a hearing if the parent contests a school district's decision and the parent seeks or demands a child's promotion from kindergarten to first grade. Such intimidation may have prompted a parent to unduly submit to a school district's decision, even though the parent held reservations regarding the wisdom of a young child being retained, or held-back, in kindergarten. An inference may be drawn that Appellant's form tended to "strong-arm" a parent into making concessions regarding a young child that was never intended by the Legislature.

In sum, Appellant's form of notice lacked essential language that showed Appellant's disregard for the unequivocal legislative intent for explicit inclusion of required language in the form of notice sent to parents of affected kindergarten students. In this regard, Appellant cavalierly proclaims that it can ignore statutorily mandated language in a notice form simply because Appellant's administration believes the language needed not be identified and used. In essence, Appellant seeks to substitute its judgment for the determination and directive of the legislature and the California Department of Education.

3. The legislature recognized that there may be minor or inadvertent instances of noncompliance with attendance accounting and reporting requirements by a school district of its student census. Section 41344, subdivision (c) states, in part:

> Notwithstanding any other provision of law, this section may not be waived under any authority set forth in this code except as provided in this section or Section 41344.1

Education Code section 41344.1, subdivision (c), prescribes, in part:

> *Compliance with all legal requirements is a condition to the state's obligation to make apportionments*. A condition may be deemed satisfied if the panel finds there has been compliance or substantial compliance with all legal requirements. *'Substantial compliance'* means *nearly complete satisfaction of all material requirements* of a funding program that provide an educational benefit substantially consistent with the program's purpose. A minor or inadvertent noncompliance may be grounds for a finding of substantial compliance provided that the local education agency can demonstrate it acted in good faith to comply with the conditions established in law or regulation necessary for apportionment of funding.... (Emphasis added.)

The facts show that Appellant's language in its form of notice for the subject fiscal year cannot be considered to have attained "nearly complete satisfaction of all material requirements." Appellant's form of notice omitted significant requirements for necessary content and form of notice dispatched to a parent when the school district proposed to not promote a pupil in kindergarten. The California Department of Education has crafted explicit language for the specific form of notice that is presented to parents or guardians of pupils who are proposed to be held back in kindergarten.

Appellant argues that it has substantially complied with the requirements of sections 48011 and 46300, subdivision (g), and thus it should not be deprived of ADA apportionment for pupils retained in kindergarten for the subject fiscal year. But, Appellant did not advance rational and good faith explanations for its failure to include important statutory mandated language in form of notice to parents.

"Good faith" is a phrase "used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party...." (Rest.2d, Contracts § 205, com. a.) Appellant, by its own admission, used a form of notice that reflected a "significant omission." Hence, Appellant's performance of the requirements under Education Code sections 48011 and 46300(g) cannot be viewed as

being consistent with the justified expectations of the State of California. Agencies of government, including school districts, are required to assure compliance with the law of the state.

Absent the mandatory content in the form of notice, Appellant failed to comply with the material requirements to earn ADA funding under the applicable apportionments mechanism.

ORDER

The appeal of Appellant Union School District is denied. Audit Finding No. 2004-2 of the audit report regarding Appellant Union School District for the fiscal year 2003-04 is upheld. The determination that Appellant Union School District be disallowed average daily attendance funding representative of eight units (which represents nine pupils) at $4,572 per unit or pupil position for a loss of funding of $36,576 is affirmed.

DATED: August 24, 2005

PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings